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No. 10-821

In the Supreme Court of the United States

PAT QUINN, GOVERNOR OF THE STATE OF ILLINOIS,
PETITIONER,

v.

GERALD A. JUDGE, DAVID KINDLER, AND ROLAND W. BURRIS, U.S. SENATOR, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioner

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REPLY BRIEF FOR PETITIONER

Respondents Gerald A. Judge and David Kindler challenge very few of the points raised in the petition.[1] They do not dispute that the new constitutional requirement announced in this case—that States must conduct a special election for every Senate vacancy, even where the vacated term will expire naturally following the next general election—is at odds with nearly a century of state practice, or that two States violated the Seventh Circuit's rule in 2010 alone. Nor do respondents contest that the rule risks voter confusion and lack of congressional representation in States, like Illinois and most others, that wait until the next general election day to elect replacement Senators, in keeping with the practice upheld in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), aff'd, 393 U.S. 405 (1969). And respondents do not deny that language in both *Valenti* and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), contemplates that some gubernatorial appointees will serve out the remainder of a vacated Senate term, in square conflict with the holding below.

The few challenges to the petition that respondents do mount are off the mark. They contend that *Valenti* and *Rodriguez* are meaningless because those decisions did not raise precisely the same issue that this case does, but the petition already made that clear, and respondents offer nothing to explain away the obvious conflict between the reasoning in those decisions and

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[1] Although former U.S. Senator Roland Burris also is a respondent to Governor Quinn's certiorari petition, Senator Burris has not filed a response to that petition. Accordingly, "respondents," as used herein, does not refer to Senator Burris.

the ruling below. Moreover, while respondents attempt to downplay the many state laws that the decision below throws into doubt—on the theory that these laws exist in States outside the Seventh Circuit, and perhaps their Circuits will adopt a different constitutional rule—this is not a reason to deny certiorari review. And while respondents contend that the petition is moot, they do so only by misapplying long-held mootness doctrine. Finally, on the merits of the Seventh Circuit's ruling, respondents contest only a footnote in the petition's construction of the Amendment's plain language, and they admit the need for some *de minimis* exception to the Seventh Circuit's rule, though they provide no principled reason to deny application of that exception here.

1. Respondents offer no way to reconcile the new rule announced in this case with the reasoning of *Valenti* and *Rodriguez*. See Pet. 13-16. Respondents contend that (1) *Valenti* involved the time between the opening of a Senate vacancy and the special election to fill it, not whether the State must hold a special Senate election; and (2) *Rodriguez* involved a Puerto Rico legislative election and therefore did not directly implicate the Seventeenth Amendment. See Br. in Opp. 13-15. But these points leave the arguments raised in the petition undisturbed.

a. *Valenti* is at odds with the Seventh Circuit's decision in at least two respects, neither of which respondents address. The petition acknowledged that *Valenti* involved the length of the gubernatorial appointee's Senate term, and that "this appeal no longer involves" that issue. Pet. 13-14. But *Valenti* presumed

that the rule it announced would permit the Governor's appointee "'to serve out the remainder of a [Senate] term,'" *id.* at 14 (quoting *Valenti*, 292 F. Supp. at 856), a fact that respondents ignore. They point out that the Governor's appointment in *Valenti* was to last only until December 1, 1970—before the new Congress took office a month later—but respondents are forced to concede that, in the end, New York did not even conduct a special election in 1970. See Br. in Opp. 12 n.2. And, again, respondents do not dispute that the *Valenti* court presumed that its rule would at times permit an appointee to serve out the remainder of a vacated Senate term. See Pet. 14.

Nor do respondents dispute that the Seventh Circuit's rule penalizes voters in States, like Illinois and most others, that seek to obtain the many advantages that *Valenti* identified in waiting until the next general election to elect a replacement Senator. See Pet. 15, 17-20. Petitioner does not misread the Seventh Circuit's decision to dictate the timing of a State's special Senate election, as respondents say. See Br. in Opp. 1. But the rule announced in this case subjects voters in "*Valenti*" States—which wait until the next general election day to hold a special Senate election—to the proven risk of confusion and lack of representation, a fact that respondents do not contest.

b. Finally, respondents do not attempt to reconcile the decision below with *Rodriguez*. They merely reiterate the point, which the petition also made, that the Seventeenth Amendment did not control directly in that case, a dispute over a Puerto Rico legislative vacancy. See Pet. 15; Br. in Opp. 14-15. But

respondents cannot deny that this Court relied critically on the Seventeenth Amendment in upholding the replacement statute challenged in that case. The Court upheld Puerto Rico's law on the ground that, if the same law were applied to a U.S. Senate vacancy, it would satisfy the Seventeenth Amendment. See Pet. 16. The decision below is impossible to square with that reasoning for, under the Seventh Circuit's new rule, the Puerto Rico law upheld in *Rodriguez*—which permitted a replacement legislator to serve "until the term of his predecessor has expired," *ibid.* (internal quotation marks omitted)—would *violate* the Seventeenth Amendment if applied to U.S. Senate vacancies.

Indeed, respondents acknowledge the statement in *Rodriguez* "'that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate,'" but respondents dismiss this statement as the product of something short of a "reasoned analysis" of the Amendment. Br. in Opp. 15 n.3. Because the outcome in *Rodriguez* followed directly from the Court's reading of the Seventeenth Amendment, however, it is impossible to see how this statement construing the Amendment could be described as unreasoned.

2. Nor can respondents minimize the importance of the question presented to States and voters nationwide. See Pet. 20-23. Respondents claim that none of the other laws now vulnerable to facial constitutional attack exist in States within the Seventh Circuit, so the decision below will not directly control the constitutional question in those States. See Br. in Opp. 16. This argument does not hold together.

Elsewhere, respondents defend the merits of the Seventh Circuit's decision, see *id.* at 5-7, yet here they suggest that other States' laws may withstand future scrutiny because other Circuits may reach a "different conclusion[] from the Seventh Circuit regarding the constitutional question," *id.* at 16. In any event, the Seventh Circuit's decision "creates an intractable uncertainty" for the many States whose laws would be invalid under the Seventh Circuit's new rule. Pet. 22-23; see also State *Amici* Br. 9-11. Respondents offer no refuge for those States that now must choose whether to apply their statutes as written, risking costly litigation and confusion, or to follow the ruling of a federal appellate court.

Respondents also attempt to downplay the effect on other States with the observation that their laws are worded differently than Illinois' and have not been tested in court, see Br. in Opp. 16-17, but this line of argument is equally meritless. Respondents do not offer a reading of *any* of these laws that would preserve their constitutionality under the decision below. On the contrary, respondents' own recitation from the California, Connecticut, and Maryland statutes demonstrates that there are circumstances in each of those States where a Senate appointee may complete a term without a replacement election: in California an appointee may do so if the State chooses to forgo a special election, in Connecticut an appointee completes the vacated term if the vacancy occurs less than 62 days before the next election, and in Maryland the appointee serves out the term if the vacancy occurs within 21 days of the deadline for filing certificates of candidacy in the

election held in the *fourth* year of the term. See Br. in Opp. 16-17. The plain language of each of these laws permits an appointee to serve until the end of the vacated term, an outcome that the Seventh Circuit's decision forbids. See Pet. App. 37a.

And what would be the saving construction of a law like New York's, for example, which provides that, "[i]f a vacancy occurs in the office of a United States senator from this state in an odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the third day of January in the next odd numbered calendar year?" N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2010). There is no way to read this law other than to do precisely what the Seventh Circuit's new rule prohibits—to permit some appointees to serve out the remainder of a vacated Senate term.

Finally, respondents' claim that "states have been moving away from appointments and to early special elections to fill Senate vacancies," Br. in Opp. 17, is false. Since 2000, no State has held a special election to fill a Senate vacancy in the last two years of a term, with the exception of the special election that the Seventh Circuit ordered in this case. Indeed, not counting the vacancy that is the subject of this litigation, the last six Senate vacancies to arise after the general election in the fourth year of the term (all since 1999), were filled by appointment, with the appointee serving through the end of the term. See State *Amici* Br. App. A at 6. As the State *amici* point out, the overwhelming majority of States opt to forgo a vacancy election either expressly through their election laws or in practice. See State *Amici* Br. 9-15. Moreover, neither of the two vacancies

respondents cite in support of their claim—the Byrd vacancy in West Virginia and the Kennedy vacancy in Massachusetts—occurred within the last two years of those Senators' terms. See Brief in Opp. 17. And both of those vacancies were filled by appointment until a successor was elected, see State *Amici* Br. App. A at 6, and Massachusetts actually amended its law in 2009 to permit an appointment, see MASS. GEN. LAWS ch. 54, § 140(f) (effective Sept. 24, 2009).

3. Respondents' remaining challenge to Supreme Court review is their contention that petitioner's claim is now moot, but even respondents concede that a disagreement over mootness does not preclude certiorari where "'the petition presents an issue (other than mootness) worthy of review,'" Br. in Opp. 20-21 (quoting Eugene Gressman, *et al.*, SUPREME COURT PRACTICE (9th ed. 2007), at 939 n.33), as this petition does, see Pet. 13-29. In any event, as the petition demonstrated, this case falls easily within the exception to mootness for disputes capable of repetition yet evading review. See Pet. 29-32. Respondents' arguments to the contrary misstate the law and selectively describe the facts.

a. Respondents erroneously claim that the question presented does not "evad[e] review" because the lower courts had sufficient time to adjudicate the Seventeenth Amendment issue before the November 2010 election. See Br. in Opp. 9-10. This misconceives the first prong of the mootness exception, which asks whether, due to the passage of time, the issue sought to be litigated will escape "considered plenary review in *this* Court." *Neb. Press Ass'n v. Stuart*, 427 U.S. 529, 547 (1976)

(emphasis added); see also *Norman v. Reed*, 502 U.S. 279, 287-288 (1992) (election-law challenge qualified for mootness exception where election was held after entry of state supreme court judgment but before disposition of certiorari petition from that judgment). Thus, while respondents focus on the roughly two years between President Obama's Senate resignation and the November 2010 election, see Br. in Opp. 9-10, that the case did not reach this Court even in that time (the outer limit for a controversy of this nature) strongly supports application of the mootness exception.

b. Respondents seek to shore up their mootness claim by falsely accusing petitioner of having "delayed seeking this Court's review." Br. in Opp. 10. But petitioner cannot be faulted for initially seeking further review of the Seventh Circuit's June 16, 2010 decision in the court already familiar with the case. That the Seventh Circuit quickly amended its earlier opinion to clarify that (as petitioner had explained in his rehearing petition) Illinois election law would have to give way to implement the court's new constitutional rule, see Pet. 9-10, confirms the correctness of petitioner's order of proceeding. Nor is petitioner's decision against seeking a stay and expedited review from this Court evidence of delay. Respondents' suggestion otherwise, see Br. in Opp. 10, ignores that when the Seventh Circuit denied the rehearing petition in July 2010, the time had already passed to comply with state election law for holding a November special election. State authorities had less than two months to create an orderly process for determining the special election candidates and ready ballots for absentee voters, and less than three

months remained before Illinois early voting began, see Pet. 31. Petitioner could not risk the disarray that would have ensued had the Court granted a stay but denied certiorari during the short time remaining before the November 2010 election. See *ibid.* To preserve the integrity of the election process, petitioner had no choice but to proceed as ordered by the Seventh Circuit and seek certiorari after the election's conclusion.

c. Respondents compound their error by arguing that the question presented is unlikely to recur in Illinois because "only" three Senate vacancies have arisen in that State since the Seventeenth Amendment's ratification. Br. in Opp. 10. The mootness exception requires a reasonable expectation that the controversy will recur as to the same complaining party *once*. See, *e.g.*, *Davis v. FEC*, 554 U.S. 724, 736 (2008) (challenge to self-financing provisions of federal campaign finance law not mooted by election's conclusion because plaintiff intended "to self-finance another bid for a House seat"); *FEC v. Wisc. Right to Life*, 551 U.S. 449, 463-464 (2007) (same regarding challenge to advertising restrictions in federal campaign finance law where plaintiff "planned on running 'materially similar' * * * broadcast ads" in future election). Senate vacancies followed by gubernatorial appointments are common, having occurred nearly two hundred times since the Seventeenth Amendment's ratification and with particular frequency in recent years, see Pet. 20-22, and Illinois' practice (but for the Seventh Circuit's decision below) is to allow a Senator appointed during the final third of a vacated Senate term to serve out the remainder of the term, see Pet. 3-4 & n.1. This

is ample evidence that the question presented is reasonably likely to arise again in Illinois if this Court does not resolve it now.

4.a. In the end, what remains of respondents' brief is a dispute over the merits of the Seventh Circuit's ruling, a battle that respondents join solely in their statement of facts. See Br. in Opp. 5-7. And while the parties' disagreement over the merits of the case is not grounds to deny certiorari review, it bears noting that respondents do not address the Governor's primary textual argument on this score, see Pet. 23-25, disagreeing instead with a single footnote, which merely sets out an alternative construction that also favors petitioner, see Br. in Opp. 5-6; Pet. 24-25 n.15.

Moreover, respondents' reading runs counter to the States' longstanding, established practice, and respondents do not dispute that such practices carry significant weight in constitutional interpretation. See Pet. 25; State *Amici* Br. 6-8. There is no doubt that the States' usual procedure is to permit a Senate appointee to finish the term when that term expires naturally following the next general election. That practice is "the gloss which life has written upon" the Seventeenth Amendment, *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940), and respondents identify no "definite support for a contrary construction" to overturn "the established practices of the states," *Smiley v. Holm*, 285 U.S. 355, 369 (1932).

b. Nor do respondents dispute the need for some *de minimis* exception to the Seventh Circuit's new rule. See Br. in Opp. 6-7. They contend merely that the few

weeks remaining between certification of the November election results and the start of the next Congress in January do not qualify for that exception. But respondents offer no meaningful support for this conclusion. They claim merely that these weeks were important in 2010, citing some of the legislation addressed during the final weeks of the 111th Congress. See *id.* at 7. Whether having an appointed Senator continue to serve during these weeks will constitute a *de minimis* deprivation cannot be judged in hindsight, however, based on what transpired in the case under review. Courts must know what is *de minimis* beforehand, and the weeks between certification and the start of the next Congress are frequently unused, see Pet. 28, an historical fact that respondents do not contest.

Moreover, respondents ignore the flip side of their reliance on the important issues addressed during the final weeks of the outgoing, 111th Congress. Because Representative Mark Kirk won Illinois' court-ordered special Senate election, and thereby resigned his House seat to join the Senate for the month of December 2010, his constituents in Illinois' Tenth Congressional District were entirely unrepresented during these same weeks. See Br. in Opp. 7. This lack of congressional representation is likely to recur under the Seventh Circuit's decision, see Pet. 19-20, and therefore is yet another compelling reason to recognize these weeks as *de minimis* in any Seventeenth Amendment analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General
of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

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